

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA,

Plaintiff,

v.

NO. 1:96CR8-S

ELAINE BYNUM, ANTHONY KINCHEN, et al.,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART
MOTION OF KINCHEN TO DISMISS

In this criminal matter, defendant Anthony Kinchen, a seventy-seven-year-old resident of Michigan, is charged in three counts of a six-count indictment involving certain checks stolen from a Michigan mortgage company. In Count One, Kinchen, along with is four co-defendants, is charged with possession of stolen property which crossed a state boundary. In Counts Three and Five, he is charged with receiving stolen United States Treasury checks with knowledge that the checks were stolen and contained false and forged endorsements. The present indictment is not the first occasion on which Kinchen has faced these charges. In 1993, he pled guilty before the United States District Court for the Eastern District of Michigan to one count of an information that he received and delivered stolen Treasury checks in violation of 18 U.S.C. § 510(b). The checks which formed the basis for the Michigan information and the checks which underly Counts Three and Five of the instant indictment are the same, as is the statutory

predicate for each. He was sentenced to fifteen months imprisonment. This cause is presently before the court on Kinchen's motion to dismiss the indictment based on speedy trial and double jeopardy violations. Each will be considered in turn.

Although styled as a speedy trial claim, Kinchen's motion is actually based in part on an alleged violation of the Due Process Clause for pre-indictment delay based on the government's "unnecessary delay in presenting this charge to the grand jury...or in filing an information...." In response, the government argues that Kinchen has not carried his burden of proving both prongs of the applicable test, namely, that the delay was intentional and improperly motivated and that it resulted in actual prejudice to the defendant. United States v. Crouch, No. 93-7719, 1996 WL 284967, at *1, *24 (5th Cir. May 30, 1996) (en banc).

Having carefully considered the argument of counsel and the applicable case law, the court finds this portion of the motion is not well taken. Kinchen offers absolutely no evidence to indicate that the delay in seeking indictment was "intentionally brought about by the government for the purpose of gaining some tactical advantage over the accused in the contemplated prosecution or for some other bad faith purpose." Crouch, 1996 WL 284967, at *24. Although this failure is fatal to Kinchen's claim, the court has examined his allegations of prejudice as well. In that regard, Kinchen argues that he has been deprived "of the opportunity to

deal will all the charges simultaneously," "of the chance to have his sentencing factors grouped," and "of any defense that he may have had to [the Michigan] charges." He also maintains that in an effort to put the whole matter behind him, he and his attorney "did not deal with evidentiary matters" as they would have if they had anticipated additional charges in another state two and one-half years later. In this court's opinion, these bald allegations which have not been supported with either legal or factual argument are simply insufficient to demonstrate actual, substantial prejudice to Kinchen's defense as required by Crouch.

The court reaches a different conclusion, however, as to Kinchen's charge that Counts Three and Five subject him to double jeopardy. Indeed, the government itself concedes that "to the extent that [those counts] charge the defendant with knowing receipt or retention of stolen Treasury checks, those offenses should be dismissed as violations of the prohibition against Double Jeopardy." It argues against outright dismissal of those counts, however, as follows: under section 510(b), a defendant can be convicted for receiving, retaining, and concealing a United States Treasury check if he knows that the check is "stolen or bears a falsely made or forged endorsement or signature." In this case, Kinchen cannot be retried for receiving checks which he knew were stolen since he has already been convicted and served time for those acts. He can, however, according to the government, be tried

for receiving checks which he knew bore a "falsely made or forged endorsement or signature," as these are separate and distinct charges from the one to which Kinchen pled guilty in the Eastern District of Missouri.

Having carefully considered the matter, the court is of the opinion that reprosecution of Kinchen for violation of 18 U.S.C. § 510(b) as enumerated in Counts Three and Five of the instant indictment violates the prohibition against double jeopardy, as it would subject Kinchen to "multiple prosecutions and multiple punishments for the 'same offense.'" United States v. Cruce, 21 F.3d 70, 72 (5th Cir.) (citation omitted), cert. denied, ____ U.S. ___, 115 S.Ct. 174, 130 L.Ed. 2d 110 (1994). In this court's view, the government's reading of the statute is equivalent to saying that if a jury finds a defendant received a single check that was both stolen and bore a false or forged endorsement or signature, he has committed two separate offenses under a single statute for which he can be punished twice. As this court reads it, the statute simply provides two "different means of committing [one] offense," Sanabria v. United States, 437 U.S. 54, 66 n.20 (1978), making the different-element test of Blockburger v. United States, 284 U.S. 299, 304 (1932) (which "applies to determinations of whether Congress intended the same conduct to be punishable under two criminal provisions," United States v. Kimbrough, 69 F.3d 723, 729 n.5 (5th Cir. 1995), cert. denied, ____ U.S. ___, 116 S.Ct.

1547, 134 L.Ed. 2d 650 (1996)), inapplicable. To allow the government to proceed with its prosecution of Kinchen on Counts Three and Five would be improper.

Accordingly, it is ORDERED:

That the motion of defendant Anthony Kinchen to dismiss is granted in part and denied in part;

That Counts Three and Five of the indictment are hereby dismissed.

SO ORDERED this _____ day of June, 1996.

CHIEF JUDGE